Nos. 83-539 and 83-548

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ARTHUR ANDERSEN & CO., et al.,

Petitioners,

v.

JAMES A. SCHACHT, the Acting Director of Insurance of the State of Illinois and Liquidator of Reserve Insurance Company,

Respondent.

ISADORE BROWN, et al.,

Petitioners,

v.

JAMES A. SCHACHT, the Acting Director of Insurance of the State of Illinois and Liquidator of Reserve Insurance Company,

Respondent.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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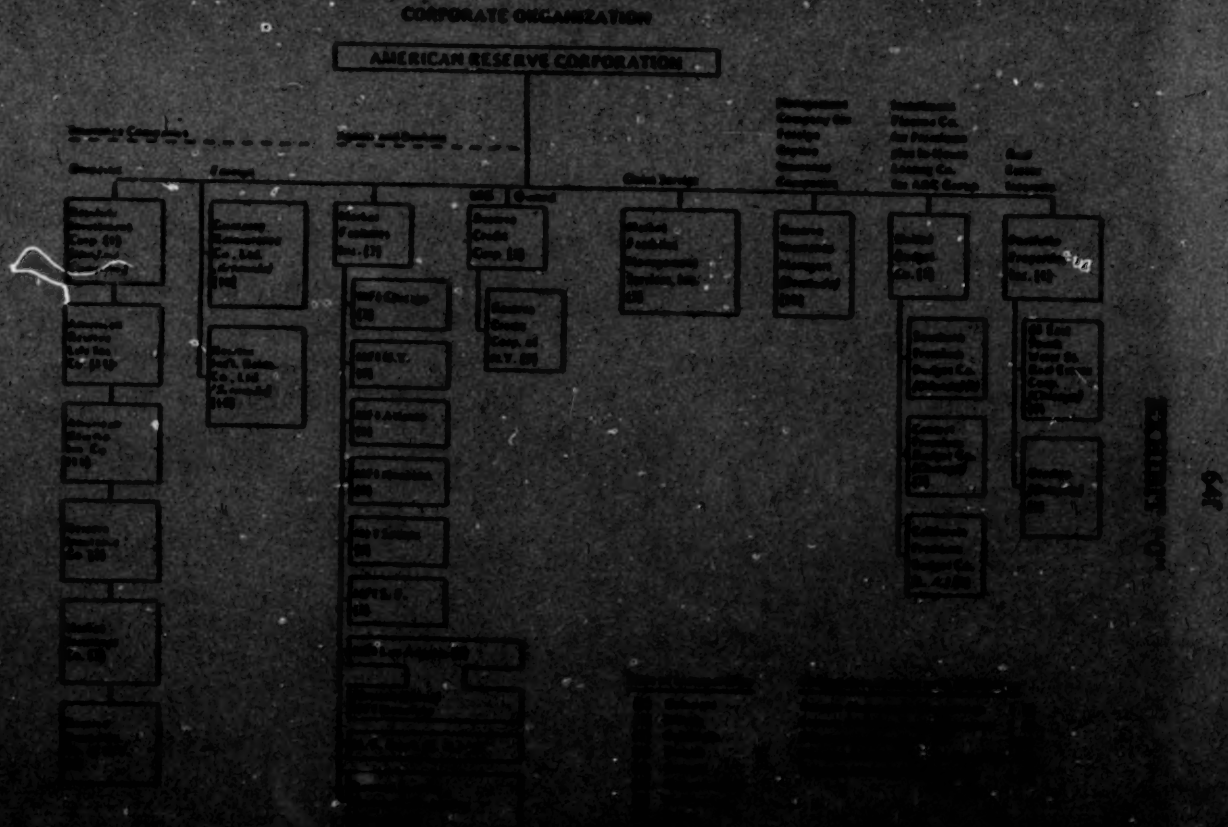
QUESTIONS PRESENTED

Each petition's statement of "Questions Presented" violates the dictates of Supreme Court Rule 21.1(a) that questions should be expressed in the terms and circumstances of the case and should not be argumentative. Every question petitioners present is dependent upon mischaracterizations of the court of appeals opinion and the allegations of the complaint. Furthermore, the accountant and reinsurance petitioners have hidden within the folds of their first question a substantive argument not presented to the court of appeals: that is, that RICO is not violated unless the perpetrator gains an "economic advantage" by his conduct. The assertion of this argument offends the Court's policy of not considering issues that were not briefed or argued below.


CORPORATE ORGANIZATION
AMERICAN RESERVE CORPORATION

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OPINIONS BELOW

Each petitions' description of the opinions below omits to state that the Seventh Circuit opinion, for which this writ of certiorari is sought, affirmed the district court's denial of the petitioners' motions to dismiss the Director's complaint. The district court also held that the alle-

gations of the complaint were sufficiently specific to satisfy Rule 9(b) of the Federal Rules of Civil Procedure. No appeal was taken from this holding.

STATEMENT

The plaintiff in this cause is the Director of Insurance of the State of Illinois who, in accordance with the Illinois Insurance Code, Ill.Rev.Stat. chap. 73, para. 799 *et seq.*, was appointed liquidator of Reserve Insurance Company when it was declared insolvent, was vested with title to Reserve's causes of action, and was directed "to take such action as the nature of this cause and the interests of the policyholders, creditors, stockholders or the public may require. . . ."*

The Petitioners' Victimization Of Reserve Insurance Company

The petitioners' descriptions of the allegations in the Director's complaint—which they say is about "underestimation" of an insurance company's reserves (Acct. at 4, Offs. at 3)**—are outright misstatements. The complaint charges each petitioner with knowingly assuming a necessary role in an ongoing scheme fraudulently to continue operating an Illinois insurance company long after it had reached insolvency, a scheme which misled

* *People of the State of Illinois v. Reserve Insurance Co.*, No. 79 CH 2828, Circuit Court, Cook Cty., Ill. (May 29, 1979).

** "Acct." refers to the petition filed jointly by the accountant and reinsurance defendants. "Offs." refers to the petition filed jointly by the officer and director defendants.

the state insurance regulators, was fatal to the company, and left thousands of Illinois citizens holding worthless insurance policies.

Reserve, an Illinois domiciled company, was the wholly owned subsidiary of American Reserve Corporation ("ARC"), a publicly held insurance holding company. ARC controlled every detail of Reserve's corporate life. ARC's officers were Reserve's officers (¶¶11, 14, 16-18);* its directors were Reserve's directors (¶¶5-10, 12, 13, 18); and its auditors were Reserve's auditors (¶¶21-23).

Reserve had traditionally written high-risk policies. Acting with the full knowledge of its auditors at the time, petitioner Arthur Andersen and Company, from at least the late 1960's Reserve's managers had consistently underreserved for claims under these policies (¶¶26, 27). Eventually, the dangerous combination of writing risky business without adequately reserving for it began to result in substantial losses. By 1974, at the latest, Reserve was insolvent (¶29). Because it is illegal in Illinois for an insolvent company to write insurance, Ill.Rev.Stat. chap. 73, para. 756.1 (¶41), it was at this point that the petitioners formulated and implemented a scheme to conceal Reserve's insolvency. The purpose of the scheme was to prolong Reserve's existence so that it could continue to generate income for the petitioners.

One aspect of the scheme was to cause Reserve to enter into a financing arrangement, which masqueraded as a legitimate reinsurance deal, with petitioner Societe Commerciale De Reassurance ("SCOR") (¶30). At the time the arrangement was entered SCOR was aware that Reserve was insolvent and knew that the arrangement concealed

* Paragraph references are to the Director's complaint, reprinted at 1f-70f of the Petitioners' Joint Appendix.

the insolvency. Still, SCOR willingly joined in and advanced the petitioners' purposes (¶37).

Under the terms of the arrangement Reserve ceded its least risky and most profitable business to SCOR. SCOR retroceded most of the Reserve business to non-petitioning defendant Guaranty Reinsurance Company ("GRC"), an unregulated off-shore company owned by ARC. ARC guaranteed GRC's performance to SCOR (¶30). The upshot of these transactions was that Reserve transferred away its most profitable business to GRC (¶¶30-32, 42), which sent its resulting profits upstream to its parent, ARC (¶¶30-32, 42); SCOR paid "commissions" to Reserve helping it to appear solvent (¶33); and SCOR was reimbursed for its expenses and received an additional $2.5 million from ARC (¶35). In short, this deal made money for every party involved except Reserve.

The SCOR arrangement was formalized in December, 1974. ARC's principals disclosed Reserve's cession to SCOR to the Illinois Department of Insurance, as required by law, but SCOR's retrocession to GRC, the ARC guaranty of GRC's performance and the so-called "commission payments" were intentionally not disclosed (¶31). In Spring of 1975, the Department of Insurance, concerned about Reserve's financial condition, called in ARC's principals and demanded that they enter a consent decree aimed at reducing new business written by Reserve and protecting Reserve's assets from ARC and its other subsidiaries (¶38). Even as ARC's principals were negotiating the terms of the decree with the Department they concealed the retrocession and guaranty aspects of the SCOR arrangement, knowing that these aspects would enable covert circumvention of the decree's restrictions. Further, a few months after the decree was entered, ARC reorganized its subsidiaries in a manner which permitted ARC's management secretly to direct Reserve business to ARC

subsidiaries which were beyond the reach of Illinois regulators and the consent decree (¶¶45-48).

The core element of the petitioners' scheme was Reserve's and ARC's financial statements, prepared for submission to state and federal regulators. Each year from at least 1968, these statements hid Reserve's true disastrous condition by understating the company's liabilities (¶¶26, 29, 50, 53, 54, 56). This was done knowingly and intentionally by ARC's principals and the auditors they engaged. Documents in the record before the Seventh Circuit indicate that in 1975 an Andersen partner had concluded that Reserve was $10-20 million underreserved and considered the company insolvent; in 1976, petitioner Coopers & Lybrand, ARC's new auditors, believed Reserve was $23 million underreserved; in 1977, petitioner Alexander Grant and Co., hired by ARC to replace Coopers, determined that in fact 1976 loss reserves had been understated by $22 million. Nevertheless, in 1975, 1976 and 1977, the auditors issued opinions that were unqualified as to loss reserves.

By 1979, the petitioners' deceptive practices could no longer conceal Reserve's insolvency (¶61). That year the Securities and Exchange Commission issued a report of an investigation it had conducted focusing on the treatment of the SCOR arrangement on ARC's financial statements (¶¶58-60). Soon after, Reserve was placed in liquidation, and ARC filed a plan for reorganization in the United States Bankruptcy Court for the Northern District of Illinois. *In re American Reserve Corporation*, 80 B 04786 (N.D. Ill., filed April 21, 1980). Subsequently, an Examiner appointed by the bankruptcy court concluded that ARC's financial statements through the 1970's had been grossly misleading, and that ARC's principals and auditors had probably known they were misleading. On the heels of the Examiner's Report, ARC's Chapter 11 proceeding was voluntarily converted to a Chapter 7 liquidation.

REASONS FOR DENYING THE WRIT

I.

THE CENTRAL QUESTION POSED BY THE PETITIONERS MISCHARACTERIZES RICO'S STATUTORY SCHEME AND IS NOT PRESENTED BY THE COMPLAINT.

Petitioners' central question for review is whether common law fraud accompanied by two mailings will alone sustain a RICO treble damage action (Acct. at 1, Offs. at i). To the extent that this question is intended simply to pose an abstract question about RICO, the Seventh Circuit dealt with it directly and summarily: "[N]either common law fraud nor securities law violations will, by themselves, be automatically eligible for redress through a civil RICO action; there is the additional requirement under §1964(c) [sic, §1962(c)], discussed *infra*, that an interstate enterprise be conducted 'through' a pattern of such activity" (App. at 24a).* The Eighth Circuit has given a nearly identical response to the same question:

> "In oral argument, the view was expressed that if we recognized appellants' claim as a RICO action, any scheme to defraud executed through two mailings would create a civil RICO claim. This misstates the elements of a RICO offense. Under the facial terms of section 1962, a RICO claim can only be stated where the scheme to defraud involves an enterprise, and where the enterprise is one which 'is engaged in, or the activities of which affect' interstate commerce." *Bennett v. Berg*, 685 F.2d 1053, 1064 n. 17 (8th Cir. 1982), *adopted en banc*, 710 F.2d 1361 (8th Cir. 1983).

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* "App." references are to the Seventh Circuit opinions, reprinted at 1a-37a, 1b-2b of the Petitioners' Joint Appendix.

To the extent the petitioners insinuate that their question relates to the allegations in the Director's complaint, this constitutes their third attempt to mislead a court into believing that the Director's complaint is about nothing more than a common law fraud involving use of the mails. Neither the district court nor the court of appeals was deceived by the petitioners' rhetoric and this Court should not be either.

This case is about each named petitioner, knowing Reserve to be insolvent, lending individual and varied expertise to the operation of ARC through an ongoing course of misconduct designed to cover up Reserve's insolvency. The misconduct included deliberate overstatement of reserves and falsification of financial statements, fake reinsurance, illegal dividends and systematic looting of Reserve's most profitable business all to the detriment of Reserve, its policyholders and creditors. As the district court and the court of appeals recognized, this is the stuff of which civil RICO is made.

RICO's private civil remedies, set out in 18 U.S.C. §1964(c), are available to "any person injured in his business or property by reason of" a violation of 18 U.S.C. §1962(a), (b) or (c). Section 1962(c), emphasized here, in turn, is violated when a "person" (the defendant) participates in conducting the affairs of an "enterprise" through a "pattern of racketeering activity." The gist of the Director's assertions is that the petitioners associated with ARC, the central enterprise involved, and conducted ARC's affairs through a "pattern of racketeering activity," i.e., the scheme to defraud, outlined above, in furtherance of which scheme the mails were used. Reserve was injured by reason of the full range of this conduct which artifically prolonged its existence and deepened its insolvency (*See* App. at 16a).

After scrutinizing the allegations of the complaint the Seventh Circuit concluded that they satisfied all the essential elements of RICO: that the petitioners' alleged conduct was precisely the type explicitly proscribed by §1962(c); and that Reserve as a victim of such conduct was a "person" within the meaning of §1964(c) and therefore had standing to bring the action. The court stated:

> "[T]he whole thrust of the Director's complaint is that Reserve was a victim of the dishonest *operation* of *ARC* through a pattern of sham reinsurance, falsification of financial statements, and fraudulent dealings with state insurance regulators which allowed ARC to prolong Reserve's life beyond insolvency and thus exacerbate its financial woes." App. at 31a; emphasis in original.

The court also concluded that it was this RICO-proscribed conduct that caused Reserve's injury: "Indeed, it is ARC's operation in such manner as to artificially prolong the operation of Reserve, not the mail fraud itself, which is separately underscored by the Director as the gravamen of the complaint" (App. at 18a). Therefore, contrary to the petitioners' deceptive assertion, repeated throughout the petitions, that the Seventh Circuit opinion "invites a private treble damage suit for any injury flowing solely from the predicate acts" (Acct. at 11, and also at 7, 8, 12, 16), the court of appeals analysis demands "a causal nexus between RICO-proscribed conduct and . . . damage" (App. at 32a), a nexus the court found to be alleged within the facts of the Director's complaint. In short, if this Court were to grant certiorari, it would *not* have before it for review a complaint based upon injuries resulting from mismanagement, securities laws violations or common law fraud; it would have a complaint for injuries resulting from an alleged five year course of deliberate criminal conduct proscribed by §1962(c).

Unable effectively to dispute the sufficiency of the charges of this complaint, the petitioners assert that the Seventh Circuit opinion will open litigation floodgates to *other* RICO actions that they contend should be confined to state court litigation. This argument, however, only overstates the obvious: any new statutory remedy will have an impact on the number of cases filed in federal court. The court of appeals recognized this but concluded: "Congress, as RICO's legislative history indicates, was alerted to the far-reaching implications of its enactment" (App. 36a). Indeed, Congress specifically directed that RICO "shall be liberally construed to effect its remedial purposes." Pub. L. No. 91-452, Title IX, §904, 84 Stat. 941 (1970). As this Court has commented with regard to civil antitrust suits: "To be sure these private suits impose a heavy litigation burden on the federal courts: it is the clear responsibility of Congress to provide the judicial resources necessary to execute its mandate." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979).

Stripped of feigned solicitude for federal court dockets, the thrust of the petitioners' floodgate argument is that RICO, as enacted by Congress and as applied by the Seventh Circuit, renders ordinary business persons vulnerable to treble damage actions whereas before they had only to defend themselves in state court. But petitioners and other business persons are not without tools for defending against unfounded RICO claims. For example, under Rule 9(b) of the Federal Rules of Civil Procedure *any* fraud, including mail fraud, must be pleaded with particularity.* Combining this Rule with Fed.R.

* As pointed out at p. 1 *supra*, in the district court petitioners made unsuccessful Rule 9(b) motions from which they took no appeal. The district judge's opinion regarding the sufficiency of the Director's fraud allegations is reprinted at App. at 4c.

Civ.P. 12, any RICO complaint is subject to motions to dismiss for failure to allege the elements of a §1962 violation. For example, in the leading Second Circuit civil RICO opinion, *Moss v. Morgan Stanley*, No. 83-7110 (2d Cir. Sept. 9, 1983), the court of appeals chided the district court for imposing artificial limitations on the scope of RICO, *see* p. 13 *infra*, but nevertheless upheld the dismissal of a RICO complaint that failed to state securities laws violations, the predicate acts upon which the RICO claim had been based.

Likewise, discovery rules and summary judgment procedures can facilitate expeditious resolution of baseless claims, RICO or otherwise. Invoking these procedures, along with the possible threat of the award of attorney's fees to RICO defendants joined in bad faith, *cf.*, *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), is the proper method for protecting against abusive resort to civil RICO.

In sum, the petitioners ask the Court to grant certiorari to review questions not presented by the record. The district court below denied the petitioners' Rule 9(b) motions, and the Seventh Circuit, affirming the denial of the motions to dismiss, closely examined the Director's complaint to assure that all the essential elements of a RICO claim were pleaded. Given the facial sufficiency of this complaint, the petitioners' persistent quest to find some court that will dismiss it seeks more than merely a judicial construction of RICO; it seeks a judicial repeal of the statute. For the reasons set forth above, the petitions should be denied.

II.

THE COURT OF APPEALS' REFUSAL TO ENGRAFT COURT-MADE LIMITATIONS ON RICO IS CONSISTENT WITH THE STATUTORY LANGUAGE AND DECISIONS OF THE OTHER CIRCUITS.

Throughout these proceedings the petitioners have unsuccessfully urged that some standing limitation be judicially devised and engrafted upon §1964(c) in order to preclude most victims of business-related RICO violations from bringing suit. In seeking certiorari the petitioners shift their emphasis from §1964(c) and RICO victims, and now assert that courts should devise a limitation on §1962(c) and the type of conduct it proscribes. They offer here for the first time the theory that §1962(c) is limited to conduct that creates an economic advantage for the perpetrator (Acct. at 14-17). However, this theory was not briefed or argued in the court below, and as the Court has often admonished, such a newly-presented legal argument is not an appropriate basis for granting certiorari. *Adickes v. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970); *Lawn v. United States*, 355 U.S. 339, 362-3 n. 16 (1958).

The impropriety of asserting the economic advantage theory aside, it is refuted both by the language of §1962(c) which contains no reference, explicit or implied, to economic advantage; as well as by this Court's reasoning in *United States v. Turkette*, 452 U.S. 576 (1981). The theory apparently derives from an anti-infiltration interpretation of RICO, which in turn derives from §1962(a)'s anti-infiltration thrust (Acct. at 15). By superimposing §1962(a) onto §1962(c), petitioners assert that the operation of a RICO enterprise through racketeering cannot constitute §1962(c) conduct unless ill-gotten gains are reinvested: *i.e.*, used to obtain an economic advantage by investment in or infiltration of a business (Acct. at 14-17).

But in *Turkette* this Court affirmed as §1962(c) conduct the operation of a drug and arson enterprise, although there had been no reinvestment or infiltration of any type shown. The Court rejected the notion that RICO is limited to combating infiltrative activity, and recognized that the statute, by prohibiting the "source" activity by which ill-gotten gains are initially obtained, serves both "preventive as well as remedial functions." 452 U.S. at 593.

In short, the economic advantage argument has neither a statutory nor analytical leg to stand on. Like the standing and similar artificial limitations that the petitioners and other RICO defendants have pressed upon courts since the statute was enacted, economic advantage is just another stalking horse for an exception to RICO that would insulate business criminals from liability for their misconduct. But all five circuits that have considered appeals of civil RICO claims arising from ordinary business contexts have declined to create any artificial limitations on §1962(c) or §1964(c) that would preclude victims of business crimes from pursuing RICO actions.

In the court below the petitioners had stressed a "competitive injury" standing limitation, borrowed from antitrust jurisprudence. But the Seventh Circuit rejected it, noting that Congress had explicitly declined an opportunity to enact RICO by "simply amending the antitrust laws to provide remedies for competitive harm caused by racketeering infiltration" (App. at 28a). The petitioners had also argued below that Congress did not intend RICO to encompass ordinary business crimes. After fully considering RICO's statutory language and legislative history (App. at 20a-27a), as well as petitioners' arguments, the court of appeals concluded that "[i]n sum, defendants' profession of alarm at the expansion of federal jurisdiction

over business fraud amounts to nothing less than a dispute with the very design, and not the mere application of the statute" (App. at 24a).

In *Bennett v. Berg*, *supra* 685 F.2d 1053, purchasers of interests in a retirement community alleged that the community's accountants, mortgage lenders, insurance company, developers, attorneys and corporate directors had all caused compensable RICO injuries by operating the community through conduct that included mail fraud. The defendants offered a smorgasbord of reasons for holding RICO inapplicable, including an organized crime limitation, a racketeering injury limitation, and competitive injury. Holding for the plaintiff, the Eighth Circuit rejected them all.

Likewise, in its recent opinion, *Moss v. Morgan Stanley*, *supra* No. 83-7120, the Second Circuit rejected the suggestion that RICO should not apply to "ordinary business or parties" (Slip Op. at 6342) and held:

> "[Courts should not] create standing requirements that would preclude liability in many situations in which legislative intent would compel it. Complaints that RICO may effectively federalize common law fraud and erode recent restrictions on claims for securities fraud are better addressed to Congress than to courts." Slip Op. at 6342; citation omitted (corrected opinion).

The Sixth and Eleventh Circuit have also upheld the applicability of civil RICO in business contexts. The former, in *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94 (6th Cir. 1982), affirmed the issuance of an injunction sought in a shareholders' civil RICO action founded on the conduct of a corporate promoter. The Eleventh Circuit in *Morosani v. First National Bank of Atlanta*, 703 F.2d 1220 (11th Cir. 1983), overruled limita-

tions on RICO adopted by the district court in *Kleiner v. First National Bank of Atlanta*, 526 F.Supp. 1019 (N.D. Ga. 1981), and reinstated the RICO complaint of a borrower against a bank.

The circuits' unanimous conclusion that business crimes should not be excepted from RICO reflects the fact that the statute is unambiguous. Absent "clearly established legislative intent to the contrary" the plain language of RICO must be deemed conclusive. *United States v. Turkette, supra* 452 U.S. at 580. And here, there is no legislative intent to the contrary. The history of the statute shows Congress' intention that RICO be enforced as enacted. That history is reviewed fully in the court of appeals decision and will not be set out again here (App. at 27a-30a). Suffice it to say that upon reviewing it the court held that the erection of barriers or limitations on RICO would not comport with "the central goal" of the statute (App. at 30a). *See also Bennett v. Berg, supra* 685 F.2d at 1058-9.

Finally, the petitioners assert that a "clear statement" of Congress' intentions is needed since RICO brings the federal government into areas that formerly were the sole province of the states (Acct. at 13-14). But both this Court and the court of appeals have found just such a clear statement: "[T]he language of the statute and its legislative history indicate that Congress was well aware that it was entering a new domain of federal involvement through the enactment of this measure." *United States v. Turkette, supra* 452 U.S. at 586. *See also* App. at 36a.

Contrary to petitioners' assertions, there is no disarray among courts concerning the scope of civil RICO (Acct. at 9), for the decision below and those of the Second, Sixth, Eighth and Eleventh Circuits are sufficient to resolve any confusion that may earlier have existed at

the district court level. The circuits are unanimous: RICO should be enforced as enacted, unencumbered by any artificial limitations—including "economic advantage"—that effectively create a business-crime exception to its prohibitions.

III.

RESERVE, VICTIMIZED BY THE PETITIONERS, IS NOT AND SHOULD NOT BE ESTOPPED FROM PURSUING ITS REMEDIES.

The accountant and reinsurance petitioners' second question presented for review, may a RICO action be asserted by a corporation which "initiated the alleged fraud . . . ," like their first, is based upon deliberate misrepresentations about the complaint and the opinion below. The complaint does not allege that Reserve "participated in a RICO violation" (Acct. at 21), nor did the Seventh Circuit "recognize" that under Illinois law the individual defendants' fraud would have been attributable to Reserve (Acct. at 21).

The accountant and reinsurance petitioners, isolating the fact that some of the individual defendants were officers and directors of Reserve, argue that because those defendants participated in the fraud their misconduct should be imputed to Reserve. But the court of appeals recognized that there is no universal legal principle compelling the imputation of an officer's or director's misconduct to his company without regard to the facts of a particular case. Instead, the court held that under both statutory and common law, a threshold determination of whether the alleged misconduct benefited the company must precede a consideration of attribution principles. Here the court of appeals found that far from benefiting Reserve, the petitioners victimized the company:

> "[Reserve was] fraudulently continued in its business past its point of insolvency and systematically looted of its most profitable and least risky business and more than $3,000,000 in income." App. at 8a.

It observed further that: "[T]he prolonged artificial insolvency of Reserve benefited only Reserve's managers and the other alleged conspirators, not the corporation" (App. at 9a). These facts, the Seventh Circuit held, did not "even trigger" the analysis of the other factors pertinent to whether the officers' and directors' misconduct should be imputed to Reserve (App. at 9a). In light of the allegations of the complaint and the Seventh Circuit's construction of them, Reserve may not be estopped from bringing its RICO claim.

Nor *should* Reserve be otherwise prevented from pursuing its claim. Petitioners assert that the recovery Reserve seeks is duplicative of that being sought by other parties in different lawsuits. First, this argument overlooks the fact that the Director is the only party suing for Reserve's own, distinct injuries, which include the loss of income from Reserve's profitable business and the loss of assets dissipated by the petitioners. Second, petitioners' argument founders because, as the Seventh Circuit reasoned, to the extent this complaint may overlap other lawsuits:

> "[T]he other actions . . . based on these alleged events have yet to result in any recovery. Of course, if the Director recovers successfully in the instant suit, the defendants in these actions will be able to assert the previous satisfaction of the claims of the shareholders, policyholders, and creditors of Reserve as a bar to subsequent recovery." App. at 2b.

In fact, this lawsuit provides the vehicle that will best protect against duplicative recovery because the Director is proceeding, pursuant to the Illinois statutory liquidation scheme, for the benefit of Reserve and of its

policyholders and creditors (App. at 10a). *See* Ill.Rev.Stat. ch. 73, para. 817. Any potential for double recovery can be resolved in the context of this single action. *Compare, Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 103 S.Ct. 897 (1983).

In sum, an Illinois insurance company having been victimized, the Director, acting pursuant to the Illinois statutory scheme, should be able to pursue the full range of Reserve's remedies, including this RICO action.

IV.

THERE IS NO CONFLICT BETWEEN THE SEVENTH AND EIGHTH CIRCUITS: AUDITORS AND OTHER SO-CALLED "OUTSIDERS" CAN BE DEFENDANTS IN §1962(c) ACTIONS.

The accountant and reinsurance petitioners ask that this Court review whether the complaint sufficiently alleges that they "conducted or participated in the conduct of ARC's affairs" (Acct. at 1, 23-25). Their claim is that in order to violate §1962(c) a defendant must be involved in the "management or operation" of an enterprise, and that as a matter of law neither an accountant nor a reinsurer can be so involved. Contrary to petitioners' assertion that the Seventh Circuit "ignored" this argument (Acct. at 24), the court responded directly to it:

> "As this court has noted before, in finding that a non-manager defendant arsonist met the §1962(c) requirement, 'The nature of racketeering connections to an otherwise legitimate business suggests that elements outside a company may assist in obtaining the company's illegal goals.' Thus, '[t]he substantive proscriptions of the RICO statute apply to insiders and outsiders—those merely "associated with" an enterprise—who participate directly and indirectly in

> the enterprise's affairs through a pattern of racketeering activity. Thus, the RICO net is woven tightly to trap even the smallest fish, those peripherally involved with the enterprise.' Other courts as well have had little trouble in finding that defendants who are not managers or employees in the colloquial sense are nevertheless reached by §1962(c). . . . [citing cases]" App. at 34a-35a; internal citations omitted.

Further, this aspect of the Seventh Circuit's decision is not inconsistent with the Eighth Circuit's discussion of the defendants' participation in its *en banc* opinion in *Bennett v. Berg, supra* 710 F.2d at 1361. There, the court did not hold that accountants and other outsiders *could not* be participants in a RICO enterprise; it merely expressed concern regarding the paucity of the factual basis underlying the conclusory allegation of each defendant's participation in misconduct. 710 F.2d at 1364. Here, by contrast, as the Seventh Circuit commented, the Director's complaint sets forth a factual basis regarding each petitioner's participation in the misconduct alleged (App. at 36a). Accordingly, the petitioners ask that certiorari be granted simply to have one last opportunity to convince a court that the pleadings say less than the Seventh Circuit and district court held they do.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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